STATE OF MICHIGAN

IN THE SUPREME COURT

In re Application of Consumers Power Company

TES FILER CITY LIMITED PARTNERSHIP,
Appellant

v

MICHIGAN PUBLIC SERVICE COMMISSION AND ATTORNEY GENERAL BILL SCHUETTE,
Appellees

Supreme Court No. 150395

Court of Appeals No. 305066

MPSC No. U-15675-R

ATTORNEY GENERAL'S SUPPLEMENTAL BRIEF CONCERNING WHEN CHANGES IN REGULATIONS REQUIRING GENERATORS TO PURCHASE NOx ALLOWANCES WERE IMPLEMENTED AS THAT TERM IS USED IN MCL 460.6a(8).

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Dated: July 17, 2015

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STATEMENT OF QUESTION

1. When were changes in administrative regulations requiring generators to purchase NOx allowances implemented, as that term is used in MCL 460.6a(8)?

TES Filer City answers:	2009
The Attorney General answers:	2006 (federal) and 2007 (state)
The MPSC answered:	2007
The Court of Appeals majority answered:	2007
The dissenting opinion answered:	2009

INTRODUCTION

In considering TES Filer City Station Limited Partnership's application for leave to appeal, this Court has directed the parties to submit supplemental briefs addressing when the Michigan Department of Environmental Quality's administrative rules requiring generators to purchase NOx allowances were "implemented," as that term is used in MCL 460.6a(8). The Attorney General submits this brief in response to the Court's order.

Two key factors must be considered. The first is the meaning of "implemented" in the context of MCL 460.6a(8). That statute imposes a $1,000,000 monthly ceiling on recovery of certain costs by electric generating facilities such as TES Filer City, but provides a limited exception for:

> costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented after the effective date of the amendatory act that added this subsection. [October 6, 2008].

The word "implemented," as that term is used in the context of MCL 460.6a(8), refers to when a change in federal or state environmental laws or regulations *is put into effect*—not to when a party takes action to comply with the change in federal or state environmental laws or regulations. Notably, that understanding of "implemented" is consistent with the dictionary definition of the transitive verb "implement" relied upon by both the majority[1] and partial dissenting

[1] *In Re Application of Consumers Energy Co*, ____ Mich App ____; ____ NW2d ____ (2014) (Docket No. 305066), slip op at 8.

opinions[2] in the Court of Appeals as well as a prior decision of this Court[3]: "to fulfill; carry out [or] *to put into effect* according to a definite plan or procedure."[4] (Emphasis added.)

The second key factor to be considered in applying MCL 460.6a(8) is the nature and terms of the applicable federal and state environmental laws or regulations. Here, it is undisputed that relevant federal environmental regulations pertaining to oxides of nitrogen (NOx) changed in 2005 and 2006. As discussed below, in 2005, the Environmental Protection Agency issued the Clean Air Interstate Rule, or "CAIR," under the Clean Air Act effective July 11, 2005. 70 Fed Reg 25162-25405 (May 12, 2005).

In 2006, EPA issued the related Federal Implementation Plan or "FIP." 71 Fed Reg 25304 (April 28, 2006). At that time, the FIP established, as a matter of federal law, a compliance schedule under which facilities such as those operated by TES Filer City were required to address NOx emissions beginning in 2009.

It is also undisputed that in June 2007, the Michigan Department of Environmental Quality adopted and filed with the Secretary of State parallel state regulations. 2007 Annual Admin Code Supp, R 336.1801 *et seq*. On their face, those regulations took effect as a matter of state law in 2007, even without EPA approval. The argument by TES Filer City and the dissenting opinion to the

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[2] *In Re Application of Consumers Energy Co*, (WHITBECK, J. dissenting in part), slip op at 4.

[3] *Brightwell v Fifth Third Bank of Michigan,* 487 Mich 151, 161 n28; 790 NW2d 591 (2010).

[4] *Random House Webster's College Dictionary* (2001, 2005).

contrary depends on an incomplete reading of the technical definition of "CAIR NOx allowance" in federal and state regulations. In 2009, after the EPA approved both the 2007 MDEQ regulations and minor, non-substantive amendments to those regulations adopted by MDEQ in response to EPA comments, Mich Admin Code Supp, R 336.1801 *et seq*., the MDEQ regulations became enforceable under federal as well as state law. 74 Fed Reg 71648 (August 18, 2009). In sum, the requirements that facilities such as TES Filer City address NOx emissions were established, and have continued without interruption under federal and state law, since 2006 and 2007, respectively.

Because the changes in relevant federal and state environmental regulations were put into effect, and were therefore "implemented" within the meaning of MCL 460.6a(8), before October 6, 2008, the Public Service Commission and the Court of Appeals correctly held that the exception in MCL 460.6a(8) does not apply. Accordingly, this Court should deny the application for leave to appeal.

ARGUMENT

I. In this case, applicable changes in federal and state environmental regulations were implemented before the October 6, 2008 effective date of 2008 PA 286. Those regulatory changes were put into effect in 2006 and 2007. Each set of regulations contained, on their effective date, compliance schedules that required parties such as TES Filer City to buy NOx emissions allowances in 2009.

A. MCL 460.6a(8)

As discussed in the Attorney General's Brief Opposing TES Filer City's Application for Leave to Appeal (pp 4-5), MCL 460.6a(7) authorizes some "merchant plants" who generate and sell electricity to regulated utilities under long-term contracts to recover reasonably and prudently incurred actual fuel and variable operation and maintenance costs exceeding the amount the merchant plants would have been paid under their contracts for those costs. Subsection (8) establishes an aggregate statutory ceiling of $1,000,000 per month upon the additional recovery authorized in subsection (7), but subsection (8) creates an exception to this ceiling:

> The $1,000,000.00 limit specified in this subsection, as adjusted, shall not apply with respect to actual fuel and variable operation and maintenance costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented after the effective date of the amendatory act that added this subsection.

This statutory language means that when an environmental cost otherwise qualifies for recovery under subsection (7) and environmental costs are incurred due to changes in federal or state environmental laws or regulations implemented before October 6, 2008, then the $1,000,000 recovery ceiling applies, and those costs are not recoverable. If environmental costs are incurred due to changes in federal or state environmental laws or regulations that were implemented on or after

October 6, 2008, then the statutory ceiling does not apply and recovery of environmental costs exceeding the statutory ceiling is authorized.

B. Changes in federal or state environmental laws and regulations that apply to this case were implemented well before October 6, 2008.

The United States Environmental Protection Agency (EPA) and the Michigan Department of Environmental Quality (MDEQ) possess and independently exercise statutory power to regulate air pollution. Those powers of the EPA and the MDEQ, and their respective regulations relevant to this case, are discussed below.

1. The applicable changes in federal regulations were put into effect in 2006.

Congress has codified the Clean Air Act in 42 USC 7401-7671q. 42 USC 7407(a) states:

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

After the EPA promulgates national primary ambient air quality standards or revisions of those standards under 42 USC 7409, then 42 USC 7410 requires states to adopt and submit to the EPA state implementation plans, or "SIPs." In addition, 42 USC 7410(a)(2) provides that each SIP submitted by a State shall include enforceable emission limitations and other control measures, means, or techniques

(including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance.

Turning to federal regulations related to NOx allowances, the EPA issued its regulation known as the Clean Air Interstate Rule (CAIR) effective July 11, 2005. 70 Fed Reg 25162-25405 (May 12, 2005).

In the CAIR, the EPA found that emissions of air pollutants from certain states (including Michigan) were polluting the air in other states; therefore, the CAIR requires certain states, including Michigan, to revise their state implementation plans to reduce emissions of certain pollutants, including nitrogen oxides (NOx), which contribute to the ozone and fine particulate problems in the "downwind" states. 70 Fed Reg 25162. The CAIR also states that the first phase of NOx reductions would start in 2009 (covering 2009–2014) and the first phase of SO2 reductions would start in 2010 (covering 2010–2014); the second phase of reductions for both NOx and SO2 would start in 2015 (covering 2015 and thereafter), and that the required emissions reductions would be based on controls that are known to be highly cost effective for electric generating units (EGUs). 70 Fed Reg 25162.

40 CFR 96.106(c)(2) states that a "CAIR NOx unit" shall be subject to the requirements under paragraph (c)(1) of that section starting on the later of January 1, 2009 or the deadline for meeting the unit's monitor certification requirements under §96.170(b)(1),(2). And 40 CFR 96.104(b) provides that the CAIR regulations regarding NOx emission requirements apply to a cogeneration

unit serving at any time with a specified generator capacity that supplies a specified amount of electricity to any utility power distribution system for sale. Under these provisions, the regulatory changes adopted by CAIR in 2005 apply to TES Filer City even though TES Filer City was not required to start complying with the NOx rule changes until 2009.

Effective June 26, 2006, the EPA amended its CAIR rules. 71 Fed Reg 25304-25326 (April 28, 2006). The EPA affirmed its 2005 decision to change emission standards and also adopted new Federal Implementation Plan (FIP) regulations to reduce annual emissions of sulfur dioxide (SO2) and NOx until States have approved State implementation plans (SIPs) to achieve the reductions. 71 Fed Reg 25328-25469 (April 28, 2006).

Even if the MDEQ had not adopted a state implementation plan that complied with CAIR, then 42 USC 7411(c)(2) or 42 USC 7411(d)(2) still made the CAIR requirements applicable to TES Filer City, and TES Filer City was required to buy NOx allowances in 2009 under the regulatory changes put into effect in the CAIR in 2005 and the FIP in 2006. And 71 Fed Reg 25328 expressly states, "The FIPs will regulate EGUs in the affected States and achieve the emissions reductions requirements established by the CAIR until States have approved State implementation plans (SIPs) to achieve the reductions."

In sum, these changes in the federal regulations were put into effect in 2005 and 2006—well before the October 6, 2008 effective date of MCL 460.6a(8).

2. The applicable changes in Michigan regulations were put into effect in 2007.

Part 55 (Air Pollution Control) of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451 as amended, MCL 324.5501 *et seq.,* is Michigan's principal air pollution control statute. Among other things, MCL 324.5503 says MDEQ may promulgate rules to establish standards for ambient air quality and for emissions and may enforce emissions standards. In addition, MCL 324.5512 empowers the MDEQ to promulgate rules for purposes of controlling or prohibiting air pollution. Thus, MDEQ has independent authority under state law to adopt rules regulating air pollution.

Furthermore, 42 USC 7410(a)(2)(E) requires evidence that a SIP submitted by a state to the EPA for approval is valid under state law. In other words, under the structure of the Clean Air Act, state implementation plans are developed by the states, exercising legal authority under their own respective state laws, in order to both protect the health and welfare of their citizens and to meet federal requirements. After state implementation plans have been properly adopted under state law, they become enforceable under the Clean Air Act as a matter of federal law following approval of the SIP by the EPA.

On June 25, 2007, MDEQ filed new rules with the Secretary of State setting emission limitations and prohibitions regarding oxides of nitrogen. 2007 Annual Admin Code Supp, R 336.1801 *et seq*. By their terms, those rules took effect when they were filed.

Although the 2007 rules adopted by MDEQ differ in some details from the rules adopted by the EPA in the CAIR, the state rules substantively mirror the parallel federal regulations and include the applicable substantive provisions similar to the requirements related to NOx emissions under the CAIR. For example, under 40 CFR 96.106 and under Michigan Admin Code R 336.1821, TES Filer City's facilities qualify as a "CAIR NOx unit" under the changes adopted by the EPA and the MDEQ, respectively.

The MDEQ submitted the revised NOx regulations to EPA for approval as a SIP revision on July 16, 2007. 72 Fed Reg 52038 (September 12, 2007). On December 20, 2007, EPA conditionally approved the Michigan regulations, subject to Michigan's correction, within one year, of certain minor typographical and technical deficiencies identified by EPA. 72 Fed Reg 72256 (December 20, 2007). Apparently because of the uncertainty regarding the legal status of the CAIR in late 2008 arising from the decision in *North Carolina v EPA,* 531 F3d 836 (DC Cir 2008), the MDEQ did not submit the minor revisions to the 2007 regulations identified by EPA within the time period prescribed by EPA in its conditional approval. As a result, the conditional approval automatically converted to a disapproval on December, 2008. See 74 Fed Reg 41639 (August 18, 2009).

On June 10, 2009, the MDEQ submitted the minor revisions to the 2007 rules previously requested by EPA. Those minor rule revisions, now codified as Mich Admin Code R 336.1801 *et seq.*, did not substantively change the requirements for electric generating units such as TES Filer City to control or offset NOx emissions

as provided in EPA's 2006 FIP for Michigan or in the 2007 Michigan regulations. The substantive terms in Rule 821(1)(a) under which TES Filer City was required to buy allowances in 2009 did not change in the 2009 amendments—nor were the underlying definitions in the 2007 rules substantively changed in order to make the 2009 rules apply to TES Filer City. On August 18, 2009, EPA announced that, effective October 19, 2009, it approved both the July 2007 and June 2009 submittals by Michigan in combination, as meeting the CAIR requirements, noting that the 2008 automatic disapproval was "inconsequential." 74 Fed Reg 41637-8, 41640.

The EPA also stated that its 2009 approval imposed no new additional requirements beyond those already imposed by Michigan law:

> This action merely approves State law as meeting Federal requirements and would impose no additional requirements beyond those imposed by State law . . . . [T]his action approves pre-existing requirements under State law and would not impose any additional enforceable duty beyond that required by State law . . . . [74 Fed Reg 41640.]

In sum, the 2007 MDEQ regulations that required TES Filer City to purchase NOx allowances in 2009 took effect as a matter of state law in 2007, and became enforceable under federal law in 2009.

TES Filer City argues, and Judge Whitbeck's dissenting opinion in the Court of Appeals agreed, that the 2007 MDEQ rule was not effective until it was approved by EPA in 2009 and therefore was not "implemented" until that time. That conclusion is mistaken for at least two reasons.

First, as a purely legal matter, the Clean Air Act does not preempt, and in 42 USC 7416 expressly preserves, the authority of the states, including Michigan, to

adopt their own air pollution laws and regulations for stationary sources of air pollution so long as they are no less stringent than federal standards or plans established under 42 USC 7411 or 7412. The exercise of that independent state authority does not require EPA approval. The Legislature has vested MDEQ with independent rule making authority in Part 55 of the NREPA that likewise does not require EPA approval. MCL 324.5512.

Second, contrary to TES Filer City's argument and Judge Whitbeck's dissent, the MEDQ did not "condition[…] the [2007 NOx] rule on EPA approval."[5] It is true that the 2007 MDEQ rules included Mich Admin Code R 336.1803(3), which incorporated by reference federal definitions in 40 CFR 97.102, including the EPA's definition of "CAIR NOx allowance." But read in its entirety, that definition is not, as suggested in the dissenting opinion, limited to an "authorization issued by a permitting authority . . . . under provisions of a State implementation plan that are approved [by the Environmental Protection Agency] . . . ." (dissenting opinion at p 5):

> CAIR NOx allowance means a limited authorization issued by a permitting Authority *or the Administrator [EPA] under subpart EE of this part or § 97.188, or* under the provisions of a State implementation plan that are approved under § 51.123(o)(1) or (2) or (p) of this chapter, to emit one ton of nitrogen oxides during a control period of the specified calendar year for which the authorization is allocated or of any calendar year thereafter under the CAIR NOx Program. An authorization to emit nitrogen oxides that is not issued under subpart EE of this part, § 97.188, *or* the provisions of a State implementation plan that are approved under § 51.123(o)(1) or (2) or (p) of this chapter

[5] *In Re Application of Consumers Energy Co*, (WHITBECK, J. dissenting in part), slip op at 5.

> shall not be a CAIR NOx allowance. [40 CFR 97.102 (emphasis added).]

Under this definition, a CAIR NOx allowance can exist where, for example, it is issued by EPA under Subpart EE in the absence of EPA approval of a State implementation plan,[6] or where it is issued by EPA under 40 CFR 97.188, which is part of the Federal Implementation Plan adopted by EPA in 2006. 71 Fed Reg 25328, 25421 (April 28, 2006). And, as noted above, the FIP remained in effect before, and at least until, an EPA approved state implementation plan was in place. TES Filer City's attempt to dismiss this point as "irrelevant" (Reply Br, pp 8-9) is unpersuasive. The issue is not whether TES Filer City ultimately purchased NOx allowances under Subpart EE or § 97.188 of the federal regulations in 2009, but whether Judge Whitbeck mistakenly concluded that the 2007 MDEQ regulations were not effective until 2009 on TES Filer City's theory that a "CAIR NOx allowance" did not and could not exist until EPA finally approved MDEQ's state implementation plan.

In any event, even if one assumed that the 2007 MDEQ regulations did not take effect until they were finally approved by EPA in 2009, the undisputed fact remains that at a minimum, the FIP issued by EPA in 2006 legally established, at that time, an obligation to purchase NOx allowances in 2009 substantively identical to that required under the 2007 and 2009 MDEQ regulations approved by EPA.

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[6] 40 CFR 97 covers the Federal NOx Budget Trading Program and the CAIR NOx and SO_2 Trading Programs. Subpart EE, 40 CFR 97.140-97.144, provides for, among other things, allocations of CAIR NOx allowances in the absence of an approved SIP.

Because that federal requirement was put into effect in 2006, the "excess" NOx allowance costs incurred by TES in 2009 were *not* incurred due to changes in federal or state environmental regulations that were implemented after the October 6, 2008 effective date of 2008 PA 286. The exception in MCL 460.6a(8) does not apply here.

II. As used in MCL 460.6a(8), the term "implemented" refers to when a change in federal or state environmental laws or regulations *is put into effect*—not to when a party takes action to comply with the change in federal or state environmental laws or regulations.

The foremost rule and primary task in construing a statute is to discern and give effect to the intent of the Legislature, and the words in a statute provide the most reliable evidence of the Legislature's intent. *Murphy v Michigan Bell Telephone Co,* 447 Mich 93, 98; 523 NW2d 310 (1994).

As far as possible, effect should be given to every phrase, clause, and word in a statute. The plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme must be considered, and statutory language must be read and understood in its grammatical context. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). The meaning of statutory language depends on context. Not only the bare meaning of the words, but also their placement and purpose in the statutory scheme is important. *Bailey v United States,* 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). Accord *Stanton v Battle Creek,* 466 Mich 611, 616; 647 NW2d 508 (2002). The use of verb tense is also significant in construing statutes. *United States v Wilson*, 503 US 329, 333; 112 S Ct 1351, 117 L Ed 2d 593 (1992).

As noted above, MCL 460.6a(8) provides in relevant part:

> The $1,000,000.00 limit specified in this subsection, as adjusted, shall not apply with respect to actual fuel and variable operation and maintenance costs that are incurred *due to changes in federal or state environmental laws or regulations that are implemented after the effective date of the amendatory act that added this subsection.* [Emphasis added.]

In MCL 460.6a(8), the Legislature uses the present tense and refers to changes in federal or state environmental laws or regulations that *are implemented* after the effective date of the amendatory act. Use of the present tense by the Legislature indicates the Legislature intended to refer to when changes in laws and regulations occur—not to when a party subject to a changed law or regulation complies with the changed law or regulation.

Contrary to TES Filer City's suggestion, there is no need to compile and compare an extensive list of dictionary definitions of "implement." But, as this Court has recognized, when an undefined, non-technical term is used in a statute, the Legislature has directed that the term should be "construed and understood according to the common and approved usage of the language . . . ," MCL 8.3a, and that resort to a dictionary definition to establish that usage may be appropriate. *Chandler v County of Muskegon*, 467 Mich 315, 320; 652 NW2d 224 (2002). Here, as noted above, both the majority and partial dissenting opinions in the Court of Appeals considered and applied the following dictionary definition of the verb "implement": "to fulfill; carry out [or] *to put into effect* according to a definite plan or procedure."[7] (Emphasis added.)

[7] *Random House Webster's College Dictionary* (2001, 2005).

Applying that dictionary definition here to the term "implemented" as used in MCL 460.6a(8), the relevant inquiry is when the applicable changes in federal or state environmental regulation were put into effect. As discussed in § I. B., above, the applicable changes in federal and state environmental regulations were put into effect in 2006 and 2007, respectively. The FIP was put into effect by EPA in 2006 and established, at that time, an obligation for facilities such as TES Filer City to address NOx emissions in 2009. That obligation was in effect before, and did not substantively change after October 6, 2008.

Similarly, the 2007 MDEQ NOx regulations were put into effect as a matter of state law in 2007, and established at that time an obligation for facilities such as TES Filer City to address NOx emissions in 2009. Again, that obligation was in effect before, and did not substantively change after October 6, 2008.

A statutory provision cannot be read in isolation, but instead must be read reasonably and in context. *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014). In this case, the Legislature stated the purpose of the statutory exception to the $1,000,000 ceiling by indicating the ceiling would apply only if environmental costs were incurred due to changes in environmental laws or regulations implemented after October 6, 2008. The statute does not say the exception applies because a merchant plant first paid a similar environmental cost after October 6, 2008. MCL 460.6a(8) says that an environmental cost will not be subject to the ceiling only if it is due to a change in federal or state laws or regulation implemented on or after October 6, 2008. The relevant date is the date when the

change in federal or state law was put into effect—not when a party such as TES Filer City first incurred a cost under the change.

Looking at when TES Filer City first paid for NOx emission allowances nullifies the statutory language "due to changes in federal or state environmental laws or regulations that are implemented after the effective date of the amendatory act that added this subsection." The interpretation proposed by TES Filer City effectively construes the statute as though it reads, "cost incurred . . . after the effective date of the amendatory act that added this subsection." Such a construction is contrary to the well–established principle that in reviewing a statute's language, every word should be given meaning, and a construction should be avoided if that would render any part of the statute surplusage or nugatory. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). Accord *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (1999).

In summary, the limited exception to the cost ceiling in MCL 460.6a(8) applies only where costs are incurred due to changes in federal or state environmental laws or regulation implemented after October 6, 2008. Such changes are "implemented" within the meaning of MCL 460.6a(8) when they are put into effect, not when the regulated entity pays to comply with them.

CONCLUSION AND RELIEF REQUESTED

The Public Service Commission and the Court of Appeals correctly determined that the limited exception to the $1,000,000 cost ceiling stated in MCL 460.6a(8) applies only to costs incurred due to changes in federal or state environmental laws or regulations that are implemented, i.e. put into effect, after October 6, 2008. Here, the excess costs claimed by TES Filer City were incurred due to changes in federal and state regulations put into effect, and therefore "implemented" in 2006 and 2007, respectively. Because the changes in regulations were implemented before, not after, October 6, 2008, the NOx costs incurred by TES in 2009 did not qualify for the statutory exception.

Finally, no error, let alone clear error and manifest injustice in the Court of Appeals' majority opinion has been shown, so this case does not merit review under MCR 7.302(B).

Accordingly, this Court should deny the application for leave to appeal.

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Dated: July 17, 2015